SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. ~~798~~ 69

DR. EDWARD A. BARSKY,

Appellant,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT OPPOSING JURISDICTION

NATHANIEL L. GOLDSTEIN,
Attorney General of New York.

WENDELL P. BROWN,
Solicitor General,

HENRY S. MANLEY,
Assistant Attorney General,
Of Counsel.

BLEED THROUGH

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 798

DR. EDWARD A. BARSKY,

Appellant,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT OPPOSING JURISDICTION

The opinions of the Court of Appeals are reported as *Matter of Barsky* v. *Board of Regents,* 305 N. Y. 89. The decision of the lower appellate Court is reported as *Matter of Barsky* v. *Board of Regents,* 279 App. Div. 1117 mem., which cites and relies upon *Matter of Auslander (and Miller)* v. *Board of Regents,* 279 App. Div. 447. All these opinions and the appropriate statute (N. Y. Education Law §§ 6514-6515) are appended to the "Statement as to Jurisdiction".

The appeal appears to be timely and is from a final decision or judgment of the highest Court of the State of New York.

The Petitioner-Appellant claimed in the Courts of the State certain rights and immunities under the Constitution

of the United States and was unsuccessful upon those questions. No Federal question was noticed in the opinions written in the Appellate Division or in the majority opinion of the Court of Appeals. The only suggestion of a Federal question was in the last two paragraphs of the dissenting opinion by Judge Fuld (see 305 N. Y. at page 109).

Subsequent to the decision on the merits by the Court of Appeals it amended its remittitur herein by adding the following paragraph:

> "Upon the appeals herein there were presented and necessarily passed upon questions under the Federal Constitution, viz., whether sections 6514 and 6515 of the Education Law, as construed and applied here, are violative of the due process clause of the Fourteenth Amendment. This Court held that the rights of the petitioners under the Fourteenth Amendment of the Constitution of the United States had not been violated or denied."

This Court has sometimes held that such a certificate is merely a guide to it when making its independent determination whether substantial Federal questions are involved. *Honeyman* v. *Hanan*, 300 U. S. 14 (1937). Particularly when the State courts have rendered lengthy written opinions such a certificate is of limited usefulness.

It is respectfully submitted that the appeal should be dismissed or the judgment below should be affirmed on the ground that no substantial Federal question is involved. The dissenting opinion by Judge Fuld, the only opinion which notices such questions, does them full justice but shows that they are incidental.

It suggests that the Education Law provisions may involve an excessive delegation of legislative power. Since his opinion was first issued in the form appended to the "Statement of Jurisdiction", where it cites only the *Packer Institute* case upon the delegation issue, there has

been added (see 305 N. Y. at page 109) a reference to *Niemotko* v. *Maryland*, 340 U. S. 268, 273, and to another case which like the *Packer Institute* case involved the State Constitution. These do not support the suggestion that the Education Law provisions involved in the present appeal are so vague or general as to be objectionable under the Constitution of the United States.

The citation of *Ex parte Garland* in the last paragraph of Judge Fuld's dissenting opinion suggests a Federal constitutional question but neither the facts of that case nor the method of his reference to it charge the Education Law provisions with any specific violation of the Constitution of the United States.

The proposed Federal questions suggested by the "Statement as to Jurisdiction" are "thin" in about the same degree that the document is thick. Probably there are many precedents for such an inverse correlation.

Dated, Albany, May 18, 1953.

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